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Automobiles: Assumption of Risk by Automobile Guest

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RECENT DECISIONS

Automobiles—Assumption of Risk by Automobile Guest.—Plaintiff, passenger in defendant's car, was injured when defendant, his vision totally obscured by a "blanket of snow," ran into a car parked along the side of the road. Though the day was stormy no particular difficulty had been experienced until defendant turned south onto the highway on which the accident occurred. Upon turning south, plaintiff, noticing that the wind caused snowbanks to form on this highway and that the wind and snow "obstructed vision" in the direction in which they were about to drive, cautioned defendant "to be careful." Defendant reduced his speed from 40 and 45 miles per hour to 25 miles per hour for approximately 300 feet. At this point defendant, running into the heavier downfall which "totally obscured" his vision, reduced his speed to 20 miles per hour. After traveling about 75 feet at this speed and under these circumstances, defendant collided with the rear of a car which had been forced to park. Only about 12 seconds had elapsed between the time of the turning south and the occurrence of the accident. Defendant claimed plaintiff assumed the risk of his negligence as a matter of law. In fact plaintiff herself testified that she "appreciated the danger in driving through the veil of snow being blown across the highway." Jury found plaintiff did not assume the risk and judgment was rendered accordingly.

Affirming the judgment on appeal, the Supreme Court *held* that the question as to assumption of risk was for the jury. "It is of no particular importance whether this collision occurred 400 or 500 feet south of the intersection. The important fact bearing on . . . the plaintiff's assumption of risk . . . is the distance that Haight (defendant) drove into the snow drift after his vision became totally obscured . . . . In the instant case the question as to plaintiff's assumption of risk . . . were issues for the jury and the jury's answers . . . are supported by credible evidence." *Haight* v. *Luedtke,* 1 N.W. (2d) 882 (Wis. 1942).

The Wisconsin court thus acts to affirm the well established principle that a guest in an automobile will be considered to have acquiesced only in that course of driving that has persisted long enough to give the guest opportunity to protest. *Groh* v. *W. O. Krahn, Inc.,* 223 Wis. 662, 271 N.W. 374 (1937); *Rudolph* v. *Ketter,* 233 Wis. 329, 289 N.W. 674 (1940); *Bryden* v. *Priem,* 190 Wis. 483, 209 N.W. 703 (1926); R*addant* v. *Labutzke,* 233 Wis. 381, 289 N.W. 659 (1940); *Maltby* v. *Thiel,* 224 Wis. 648, 272 N.W. 848 (1932); *Poneitowicki* v. *Harres,* 200 Wis. 504, 228 N.W. 126 (1930); *Forbes* v. *Forbes,* 226 Wis. 477, 277 N.W. 112 (1938); *Helgestad* v. *North,* 233 Wis. 349, 289 N.W. 822 (1940); *Pecor* v. *Home Indemnity Co. of N. Y.,* 234 Wis. 407, 291 N.W. 313 (1940); *Webster* v. *Krembs,* 230 Wis. 252, 282 N.W. 564 (1939); *Edwards* v. *Kirk,* 227 Ia. 684, 288 N.W. 875 (1939); *Freedman* v. *Hurwitz,* 116 Conn. 283, 164 Atl. 647 (1933): This principle is stated most aptly by the Connecticut court in *Freedman* v. *Hurwitz, supra.* "And the doctrine (of assumption of risk) can only apply where the particular situation or condition producing the risk has continued for such a length of time that the party alleged to have assumed it can be found to have known it or be charged with knowledge of it, to have appreciated the risk to which he was subjected by it, either actually or because he ought reasonably to have done so, and to have had opportunity to protest."

Further to be deduced from these cases is that the determination of assumption of risk as to adverse weather conditions will ordinarily be a jury question, *Haight* v. *Luedtke,* supra, in spite of *Knipper* v. *Shaw,* 210 Wis. 617, 246 N.W.

328 (1933), where the Supreme Court reversed the jury's finding of no assumption of risk and held that under the facts the plaintiff car passenger assumed the risk as a matter of law. In that case the plaintiff had driven with defendant for 23 miles in a very dense fog and had, furthermore, upon being previously consulted, acquiesced in proceeding. Consult *Walter* v. *Kroger Grocery and Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934); *Kauth* v. *Landsverk*, 224 Wis. 554, 271 N.W. 841 (1937). On the other hand, the court has sometimes held as a matter of law that a passenger does not necessarily assume the risk of the driver's momentary failure to keep a proper lookout. *Maltby* v. *Thiel, supra, Raddant* v. *Lubatzke, supra.*

The leading case, however, presents another aspect which is not so readily reconcilable with former Wisconsin adjudication. The statement of the court that "it is of no particular importance whether this collision occurred 400 or 500 feet south of the intersection; the important fact bearing on . . . the plaintiff's assumption of risk . . . is the distance that Haight drove into the snowdrift after his vision became totally obscured," is made in apparent disregard of the court's previous language in *Young* v. *Nunn, Bush and Weldon Shoe Co.*, 212 Wis. 403, 249 N.W. 278 (1933). Here plaintiff, knowing the type of driver defendant was, had driven some distance with him at an excessive rate of speed, when he attempted to pass a truck on the right and was forced over into a post when the truck suddenly turned in. The trial judge found no assumption of risk as a matter of law, stating that only the momentary control or management during the right hand pass was pertinent, and that as to this, plaintiff did not have time to appreciate the hazard and protest. In reversing this judgment the Supreme Court said, "if a host is proceeding at a negligent rate of speed, which the guest assumes, and by reason of this speed finds himself in a situation requiring instant decision and giving him opportunity for further negligence with respect to control, it is impossible to isolate the subsequent negligence from the prior negligence and to hold, in spite of the fact that the guest acquiesced in the former, that the momentary character of the latter makes acquiescence impossible." By examination of other cases in point, we find the results of both the *Young and Haight* cases being correct with the apparent contradiction resulting from the unfortunate language used in the latter. One cannot totally disregard the events just prior to that negligence which was the cause of the accident, as was inferred; rather one must examine that prior conduct to see if there was negligence so causally connected with the emergency resulting in the injury as to be incapable of being isolated or separated from it. Then if assumption of risk is found in regard to such prior conduct recovery will be barred. *Walker* v. *Kroger Grocery and Baking Co., supra; Monsos* v. *Euler,* 216 Wis. 133, 256 N.W. 630 (1934).

Moreover, even where an accident and injury occur due to some negligence of the host, and even though the guest has assumed the risk of the host's conduct in certain respects, recovery by the guest against his host is not necessarily barred; the risk assumed must be the cause of the accident. *Monsos* v. *Euler, supra; Pecor* v. *Home Indemnity Co. of N. Y., supra, Maurer* v. *Fesing,* 233 Wis. 565, 290 N.W. 191 (1940). In the *Monsos* case the parties had driven many miles under bad weather conditions much as in *Knipfer* v. *Shaw, supra,* but the court, in distinguishing the two cases, points out that in the latter the driving under bad conditions was the direct and proximate cause of the injury, whereas in the former the host's failure to exercise the skill and judgment he had was the cause.

In the matter of protest, ordinarily a lack of protest to host's negligent conduct will bar recovery through assumption of risk. *Groh* v. *W. O. Kahn, Inc.,*

supra. As previously stated however, where the negligence is of such limited duration that protest would be of no avail, lack of it in itself will not bar. *Pecor* v. *Home Indemnity Co. of N. Y., supra; Helgestad* v. *North, supra.* Conversely, where the negligence has been of extended duration, and a protest is made so late as to render it of no avail, the protest will be no bar to assumption of risk if one acquiesced in the negligence up to that point. *Raddant* v. *Labutzke, supra.* Though there is no case in this jurisdiction in point, a West Virginia court found that where there is a duty to protest, an unheeded protest made in an audible tone of voice by one of several passengers will relieve fellow passengers from the duty to protest. *Boyce* v. *Black,* 15 S.E. (2d) 588 (W.Va. 1941). And a cautioning, entered in evidence as a protest, must have been actually intended as such at the time and not as an aid in driving. *Raddant* v. *Labutzke, supra.* Nor will a former protest suffice to bar the assumption doctrine from working in case of injury from later negligence. *Kauth* v. *Landsverk, supra.*

From what has been said, it would seem that one essential for finding an assumption of risk by the plaintiff is knowledge on his part of the creation and existence of a specific circumstance of risk for a more or less extended time. Then how to reconcile those cases in which there was found assumption of risk where the negligence causing the injury was of the barest duration? In *School* v. *Milwaukee Auto Ins. Co.,* 234 Wis. 332, 291 N.W. 311 (1940) where a host turned onto the left side of the road to avoid a collision, the risk was at most momentary, and yet the court found assumption of risk. The ruling was that the guest assumed the risk where the host conscientiously exercised such skill and judgment as he possessed. *Schwab* v. *Martin,* 228 Wis. 45, 279 N.W. 699 (1938). The probable answer is given by Professor Harper, who points out that assumption of risk is really of two types. The first he calls voluntary exposure to a known but reasonable risk created by the defendant; the second, voluntary exposure to a known and unreasonable risk created by the defendant. The former is characterized by him by the presence or absence of a duty by the host toward the guest and, as to it, knowledge by the guest is immaterial. The latter, he maintains, is actually a form of contributory negligence, as to which knowledge of the risk is material. *Harper, Torts* (1933) p. 289. And while our Court has repeatedly held that assumption of risk is not a form of contributory negligence, *Scory* v. *La Fave,* 215 Wis. 21, 254 N.W. 369 (1934); *Knauer* v. *Joseph Schlitz Brewing Co.,* 159 Wis. 7, 149 N.W. 494 (1914); *Kelenic* v. *Berndt,* 185 Wis. 240, 201 N.W. 250 (1924), *Harper's* explanation best conciliates the holdings, since in certain instances there is obviously negligence involved in assuming a risk. The duty issue has been recognized repeatedly by our court. *Cleary* v. *Eckert,* 191 Wis. 114, 210 N.W. 267 (1926); *Grover* v. *Sherman,* 214 Wis. 152, 252 N.W. 680 (1934); *Bohren* v. *Lautenschlager,* 239 Wis. 400, 1 N.W. (2d) 792 (1942); *Sweet* v. *Underwriter's Casualty Co.,* 206 Wis. 447, 240 N.W. 199 (1932). See also *Freedman* v. *Hurwitz, supra.* "The rationalization of voluntary assumption of risk in this sense is that it negatives the existence of a duty on the part of the defendant and thus establishes his freedom from negligence." *Harper, Torts, supra.* Instances in which the duty is negatived, and thus the risk assumed by the guest, are expressed in a number of Wisconsin decisions: "The guest . . . assumes the risk of danger incident to the driver's usual and customary habits with which the guest is familiar." *Boureston* v. *Boureston,* 231 Wis. 666, 285 N.W. 426 (1939); *Harter* v. *Dickman,* 209 Wis. 283, 245 N.W. 157 (1932). The guest assumes the risk of those defects in the car unknown to the host, *Sweet* v. *Underwriter's Casualty Co.,* 206 Wis. 447, 240

N.W. 199 (1932), but not those defects which the host knew of and realized, or should have realized, involved an unreasonable risk to his guest, if the defect was so concealed or hidden as not to be reasonably obvious or patent to the guest, if the defect and the risk were in fact unknown to the guest, and if the host failed to warn the guest as to the defective condition and the risk involved therein. *Waters* v. *Markham,* 204 Wis. 332, 235 N.W. 797 (1931).

While the guest assumes the risk of the host's experience, skill and judgment, he does not assume the risk of the latter's failure to exercise that skill and judgment that he possesses. *Harter* v. *Dickman, supra.* Nor does every guest upon entering a car assume the same risks upon differing occasions. Rather one assumes the risks naturally incident to the purpose and character of the trip. Thus where a driver going to a fire in a country section to aid in fighting it did not exercise the ordinary care he was capable of, the Supreme Court found assumption of risk as a matter of law, for the guest knowing of the custom of going rather hastily to fires should have anticipated that his host would dispense with a certain degree of the care ordinarily exercised. *Sommerfield* v. *Flury,* 198 Wis. 163, 223 N.W. 408 (1929).

ALBERT J. GOLDBERG.

Conditional Sales—Interpretation of "Creditors" in Conditional Sales Statutes.—The defendants extended credit to one H. H. Fullerton on various occasions between April 30 and June 4, 1940. On June 25, 1940, the plaintiff sold Fullerton certain machinery upon a conditional sales contract executed near Muncie, Indiana. The machinery was delivered to Fullerton in Darke County, Ohio. The conditional sale contract was not filed in Darke County nor anywhere else. In January, 1941, the defendants secured a judgment against Fullerton for non-payment of the amount due them, and to satisfy this judgment they levied execution against the machinery in Fullerton's possession. The plaintiff sued to recover the machinery and contended that even though the conditional sale contract was unrecorded, his right to the machinery was superior to that of the defendants, who extended credit to Fullerton prior to the date of the conditional sale contract. In reply, the defendants pleaded the Ohio statute which made all unfiled conditional sales contracts void "as to all subsequent purchasers and mortgagees in good faith and for value, and creditors." The trial court gave judgment for the defendants, which was affirmed on appeal to the Court of Common Pleas. On appeal to the Court of Appeals, the judgment was again affirmed. The word "creditors" in the statute was held to mean all creditors, whether subsequent or prior to a conditional sales contract. The court decided that a seizure, by attachment or by appointment of a receiver, of property under the contract renders invalid as to such creditors a conditional sale contract which was not recorded. Further, it held that the right of any judgment creditor under execution was superior to that of a claimant under an unfiled conditional sale contract even thought the judgment creditor knew that the claimant held such contract. *Miller* v. *Raille & Morrison,* 39 N.E. (2d) 172 (Ohio 1941).

The problem of the interpretation of the word "creditors" in the Ohio statute was decided in another Ohio case and the findings were contrary to those of the principal case. In that case the plaintiff contracted to sell washing machines under a conditional sale contract to a retail dealer who, before the contract was executed and before delivery of the machines, borrowed money from the defendant and executed a promissory note wherein warehouse receipts for the machines were pledged. The defendant took the machines before they were de-